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NO. 84-1236

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

DONALD A. CABANA, SUPERINTENDENT, ET AL.,
Petitioners,

vs.

CRAWFORD BULLOCK, JR.,
Respondent.

BRIEF FOR PETITIONERS

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97pp

QUESTIONS PRESENTED

1. Enmund: Is It a Question of Proportionality or A Question of Fact for the Jury?

2. Did the Court of Appeals Fail to Accord the Findings of the Mississippi Supreme Court the Presumption of Correctness Mandated by 28 U.S.C. § 2254(d)?

TABLE OF CONTENTS

Page:

QUESTIONS PRESENTED ---------- i

TABLE OF CONTENTS ---------- ii-iii

TABLE OF AUTHORITIES ---------- iv-viii

I. INTRODUCTION ---------- 1

II. OPINIONS BELOW ---------- 1-3

III. JURISDICTION ---------- 3-4

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ---------- 4-8

V. STATEMENT OF THE CASE ---------- 8-38

A. The Substantive Facts ----- 8-19

B. Procedural History -------- 20-38

VI. SUMMARY OF THE ARGUMENT ------- 39-41

TABLE OF CONTENTS - Continued

Page:

VII. ISSUES, ARGUMENTS & AUTHORITIES ---------- 42-87

1. Enmund: Is It A Question of Proportionality or A Question of Fact for the Jury?

2. The Court of Appeals Failed to Accord the Findings of the Mississippi Supreme Court the Presumption of Correctness Mandated by 28 U.S.C. § 2254(d).

VIII. CONCLUSION ---------- 88

TABLE OF AUTHORITIES

Cases:	Page:
Bell v. State, 360 So.2d 1206 (Miss. 1978)	82
Bell v. Watkins, 692 F.2d 999 (5th Cir. 1982)	43
Brooks v. Estelle, 697 F.2d 586 (5th Cir. 1982)	82
Brooks v. State, 599 S.W.2d 312 (Tex. Cr. App 1979)	82
Bullock v. Mississippi, 452 U.S. 931, 101 S. Ct 3068, 69 L.Ed.2d 432 (1981)	2,33
Bullock v. State, 391 So.2d 601 (Miss. 1980)	2,20, 87
Cabello v. State, ___ So.2d ___ (Miss. No. 55, 581 1985)	78,81
Cannaday v. State, 455 So.2d 713 (Miss. 1984)	73
Clark v. Louisiana State Penitentiary, 694 F.2d 75 (5th Cir. 1982)	43,59
Coleman v. State, 378 So.2d 640 (Miss. 1979)	71,72
Dixon v. State, 283 So.2d 1 (Fla. 1973)	48
Douthit v. State, 239 Ga. 81, 235 S.E.2d 493 (1977)	82
Drake v. Francis, 727 F.2d 990 (11th Cir. 1984)	78
Edwards v. State, 441 So.2d 84 (Miss. 1983)	72
Enmund v. Florida, 458 U.S. 782, 73 L.Ed.2d 140, 102 S. Ct. 3368 (1982)	39,42
Enmund v. State, 399 So.2d 1362 (Fla. 1981)	47

TABLE OF AUTHORITIES - Continued

	Page:
Green v. State, 242 Ga. 261, 249 S.E. 2d 1 (1978)	82
Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, 96 S. Ct. 2909 (1976)	69
Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984)	78
Henry v. Wainwright, 721 F.2d 990 (5th Cir. 1983)(Unit B)	78
Irving v. State, 441 So.2d 846 (Miss. 1983)	77
Johnson v. State, ___So.2d___, (Miss. 55,265, 1985)	78,81
Jones v. State, 461 So.2d 686 (Miss. 1984)	72
Jones v. Thigpen, 741 F.2d 805 (5th Cir.), petition for cert. filed, 53 U.S.L.W. 3720 (U.S. Jan. 30, 1985)(No. 84-1237)	43
LaVallee v. Delle Rose, 410 U.S. 690, 35 L.Ed.2d 637, 93 S. Ct. 1203 (1973)	86
Leatherwood v. State, 435 So.2d 645 (Miss. 1983)	75,82
Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S. Ct. 2954 (1978)	31
Marshall v. Lonberger, 459 U.S. 422, 74 L.Ed.2d 646, 103 S. Ct. 843 (1983)	84
Mhoon v. State, 464 So.2d 756 (Miss. 1985)	72

TABLE OF AUTHORITIES - Continued

	Page:
Moore v. State, 240 Ga. 807, 243 S.E.2d 1 (1978)	82
Newell v. State, 308 So.2d 71 (Miss. 1975)	77
Pulley v. Harris, ___U.S.___, 79 L.Ed. 2d, 104 S. Ct. 871 (1984)	40,61 67
Reddix v. State, 381 So.2d 999 (Miss. 1980)	25,82
Reddix v. Thigpen, 728 F.2d 705, reh. den., 732 F.2d 494 (5th Cir., cert. den., ___U.S.___, 105 S. Ct. 397, 83 L.Ed.2d 331 (1984)	38,43 58,85
Ross v. Kemp, 756 F.2d 1483 (11th (Cir. 1985)	40,78 44
Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450, 61 L.Ed.2d 39 (1979)	59
Skillern v. Estelle, 720 F.2d 839 (5th Cir. 1983)	43,59
Smith v. State, 236 Ga. 12, 222 S.E.2d 308 (1976)	82
Solem v. Helm, ___U.S.___, 77 L.Ed.2d 637, 103 S. Ct. 3001 (1983)	39,62 67,82
Stanley v. State, 240 Ga. 341, 241 S.E.2d 173 (1977)	82
Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983)	78
Stringer v. State, 454 So.2d 468 (Miss. 1984)	81
Sumner v. Mata, 449 U.S. 539, 101 S. Ct. 764, 66 L.Ed.2d 722 (1981)	83

TABLE OF AUTHORITIES - Continued

	Page:
Sumner v. Mata, 455 U.S. 391, 102 S. Ct. 1303, 71 L.Ed.2d 480 (1982)	83
Townsend v. Sain, 373 U.S. 293, 83 S. Ct. 745, 9 L.Ed.2d 770 (1963)	86
Wainwright v. Goode, ___ U.S. ___, 78 L.Ed.2d 187, 104 S. Ct. 378, (1984)	86
Wainwright v. Witt, 469 U.S. ___, 83 L.Ed.2d 841, 105 S. Ct. ___ (1985)	86
Wiley v. State, 449 So.2d 756 (Miss. 1984)	72
Williams v. State, 445 So.2d 798 (Miss. 1984)	69,71, 72,73, 77

Codes and Statutes:

Colo. R.W. Stat. § 16-11-103 (5)(d)	60
Section 776.011, Florida Statutes (1973)	50
Ch. 72-724, 1972 Gen. Law Fla.	50
MCA § 99-19-101 (Cum. Supp. 1979)	20,77
MCA § 99-91-105 (Cum. Supp. 1979)	20,68,69
MCA § 99-34-145 (repealed April 17, 1984, Ch. 378, Miss. Laws of 1984)	33
28 U.S.C. § 636(c)	34
28 U.S.C. § 2253	37
28 U.S.C. § 2254(d)	5,41

TABLE OF AUTHORITIES - Continued

	Page:
Other:	
Eighth Amendment, United States Constitution	53
Fourteenth Amendment, United States Constitution	53

I. INTRODUCTION

This matter is before the Court on Petition of Donald A. Cabana, Superintendent of the Mississippi State Penintentiary at Parchman, and Edwin Lloyd Pittman, Attorney General of the State of Mississippi, for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit wherein the Court reversed and rendered the decision of the United States District Court for the Southern District of Mississippi denying respondent's petition for writ of habeas corpus.

II. OPINIONS BELOW

State Court: The opinion of the Supreme Court of Mississippi affirming

respondent's conviction of capital murder and sentence of death is reported as Bullock v. State, 391 So. 2d 601 (Miss. 1980) (See pp. A68-A117, Pet. for Cert.) The Court denied post-conviction collateral relief without opinion. The per curiam order denying the same was not published.

United States Supreme Court: This Court denied respondent's petition for writ of certiorari on direct appeal, and said denial is reported as Bullock v. Mississippi, 452 U.S. 931, 101 S. Ct. 3068, 69 L. Ed. 2d 432 (1981).

District Court: The opinion of the United States District Court for the Southern District of Mississippi denying respondent's petition for writ of habeas corpus is not reported. Bullock v. Lucas, S.D. Miss. No. J81-0357(N) (opinion dated June 29, 1983, Countiss, M., sitting as a

District Judge.) (See pp. A23-A67, Pet. for Cert.)

Court of Appeals: The panel decision of the Court of Appeals is reported as Bullock v. Lucas, 743 F.2d 244 (5th Cir. 1984) (See pp. A2-A20, Pet. for Cert.). The per curiam order of the Court of Appeals denying panel rehearing and suggestion of rehearing en banc is reported as Bullock v. Lucas, 747 F.2d 1465 (5th Cir. 1984) (See p. A1, Pet. for Cert.).

III. JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered September 21, 1984. A timely petition for panel rehearing and suggestion of rehearing en banc was denied October 31, 1984. The judgment of the Court of Apeals was issued, as and for the mandate, on November 13, 1984. The jurisdiction of this Court, as

particularized hereafter, is invoked under 28 U.S.C. § 1254(1).

IV. CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, viz.,

> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law . . . . ";

The Cruel and Unusual Punishment Clause of the Eighth Amendment to the Constitution as applied to the States through the Due Process Clause of the Fourteenth Amendment; 28 U.S.C. § 2254(a), viz.,

> ". . . a district court shall entertain an application for a writ of habeas corpus in behalf of a person

> in custody pursuant to a judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws . . . of the United States";

and 28 U.S.C. § 2254(d), viz.,

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for te writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise apear, or the respondent shall admit --
>
> > (1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) That the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding;

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the

sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs number (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by trhe respondent, or unless the court concludes pursuant to the provisions of paragraph number (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the

> burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

V. STATEMENT OF THE CASE

A. The Substantive Facts

The substantive facts as found by the Mississippi Supreme Court reflect that on the evening of September 21, 1978, Crawford Bullock, respondent, and Ricky Tucker, Bullock's future accomplice in this crime, pursued certain libationary diversions at the Town Creek Saloon located in the City of Jackson, Mississippi. Much to their chagrin, the pair discovered at closing time that the person with whom they had arrived had without so much as a fare-the-well departed the premises leaving

them afoot. Assuming the role as a "good Samaritan," Mark Dickson, the unfortunate victim of this scenario, offered the pair a ride.

On the way home, Bullock imposed upon Dickson to stop at a convenience store in order for him to purchase a loaf of bread. Dickson, continuing in the role as a benevolent benefactor, advanced Bullock the thirty-five cents (35¢) necessary to accomplish the purchase; however, the purchase money was returned when Bullock discoverd that the store was out of the desired commodity.

Dickson drove on at the riders' instructions. While proceeding down an uninhabited street, Bullock instructed Dickson to pull over so that he could answer "the call of nature." Upon return to the

automobile, Bullock testified that he overheard an argument between Tucker and Dickson and heard Tucker state, "Don't make me pull this gun." Dickson was thereupon heard to reply that he did not have any money but that they, Tucker and Bullock, could have the automobile. All three then re-entered the vehicle, and the argument continued. Dickson, apparently fearing injury, as rightly he should have been, stopped on Byrd Drive near the site where an overpass on Interstate 220 was being constructed and exited the vehicle. Blows were exchanged between Tucker and Dickson, and Dickson attempted to flee on foot. Tucker and Bullock pursued Dickson. Upon apprehending him, Tucker instructed Bullock to grab Dickson which he did by holding the hair of his head. At this point, Tucker, who had armed himself with a whiskey bottle, advanced on Dickson striking him several

times in the head with the bottle. During this rain of blows, the bottle broke and cut Bullock's hand. Tucker thereupon set upon Dickson striking him with fists, feet, concrete blocks and a 2 X 4 board. The evidence later showed that Dickson died as a result of having his skull crushed.

Upon completion of the heinous deed, Tucker suggested that they burn the body. However, Bullock alternatively suggested a lake south of Jackson in the Byrum Community where they could dispose of the body. Bullock's suggestion was accepted, and the two loaded Dickson's body into the car and drove to a car wash to remove the blood from the exterior of the vehicle. Tucker removed Dickson's wallet, rifled it, found no money, and discarded the same in a garbage can. Bullock then drove the vehicle to his residence where the two cleaned up. After

obtaining a garden hose from Bullock's yard the two proceeded south to Byrum. Upon arriving at the lake, Dickson's outer clothing was removed, concrete blocks placed in his underwear, and the garden hose with additional weights was wrapped around the body. Tucker then pulled the body out into the lake and submerged it. Bullock, apparently not satisfied with Tucker's efforts, waded out to where the body had been submerged and felt of the same with his feet to assure himself that the body was stuck in the mud at the bottom of the lake. This was accomplished in spite of the fact that Bullock was suffering from a previously fractured leg and had a plaster cast on the same.

Bullock and Tucker again returned to Bullock's residence where they again cleaned up. Bullock, driving Dickson's vehicle,

then took Tucker home and proceeded to the University of Mississippi Medical Center where he obtained medical attention for his hand. The following day, the pair drove Dickson's vehicle to McComb, Mississippi, for the stated purpose of visiting Bullock's grandfather. They failed to locate him and returned to Jackson. Bullock continued to retain possession of the Dickson automobile.

During the early morning hours of September 23, 1978, Bullock began to have pain in his hand and returned to the University Medical Center, again driving Dickson's vehicle. On his way back home, Bullock was stopped and arrested by officers of the Jackson Police Department and transported to the downtown precinct station. Upon being stopped and asked about the automobile he was driving, Bullock responded that he had borrowed it from a

friend. The tag which had been on the back seat on the night of the 21st had been attached to the appropriate fixture on the rear bumper.

Later, Bullock made inculpatory statements concerning the commission of the crime.[1]

---

1 During trial the following statement was introduced:

> My name is Crawford Bullock, Jr. I live at 2109 Capitol Court. I am twenty-one years old. On Thursday night, 9/21/78, a friend of mine, Rickey Tucker, and I were at the Town Creek Saloon. While we were there, we met Mark Dickson. When I got ready to leave, Mark Dickson offered me and Rickey Tucker a ride home. We left and started out west. We were in a 1978 Thunderbird color gray. The car belonged to Mark Dickson. We were going out West Capitol Street and Mark took a wrong turn and ended up on Lee Street. Mark stopped the car. I got out and took a leak. Mark and Rickey got out on the other side

of the car. At that time, I heard Rickey say: "Don't make me pull this gun". I then saw Mark take his billfold out and show it to Rickey and he said: "I don't have any money but you can take the car". Rickey then told him to get back in the car. Mark got back in the car and Rickey got in the back seat. We then went to Alabama Street and took a left on South Drive to Byrd Drive and then stopped beside an overhead bridge. Mark stopped the car. Rickey said grab him. I grabbed Mark. Rickey got out of the car and came around to the side where Mark was and then Mark ran. Rickey chased him and tackled him and started fighting with him. I came up and grabbed Mark by the hair and was holding him. Rickey came up with a whiskey bottle and hit Mark and also hit my hand cutting it very badly. At this time, I backed up and Rickey hit him about three times with his fist. Mark fell down and Rickey started jumping on his head and kicking him in the head. Rickey then picked up a piece of concrete and threw it down on Mark's head as hard as he could. Mark then started making some noises and blood started coming out of his nose. Rickey then started hitting him with a board. I then ran back to some cars that were parked across the street. I found the keys in one of them but it wouldn't crank. I

tried several more cars but we couldn't get any of them to crank. We then went back to where Mark was and we saw that he had stopped breathing. Rickey then asked me if I knew some place where we could carry him and I told him that I knew a place. I told him that I knew a place at Byrum that had a lake and we could put him in the lake.

We put him in the car and drove to a car wash in Highway 80. We then washed the car and Rickey got Mark's billfold out and went through it but there was no money in it. We threw it in a trash can there. We then left there and went to the Star station at Ellis and Lynch Street and got gas there. We left there and went to my house and got a green water hose to tie Mark up with. We left there, got on the interstate, got off at the Byrum exit and went to the Griffin Industries pond which is on the east side of the interstate. We stopped the car, got out and Rickey and I drug him up to the fence. Rickey got the hose and tied it a couple of times around his neck and pulled him about ten or fifteen yards and I told Rickey I couldn't pull any more. At this time, Rickey got under him and carried him to the pond and put him over in a boat that was there. The boat was chained and we could not use it. Rickey then took his pants off.

Rickey then got two pieces of cinder blocks and stuck one down in his underwear and the other one in his T-shirt. Rickey then carried him out in the water and sunk him. I looked and saw that part of the water hose was sticking out and so I then went out to where Rickey was. Rickey went under water and kept tying the hose around Mark until the hose was all tied up. Rickey then jumped up and down on Mark until he had him buried up in the mud. Rickey then called me to come there. I went to where he was and felt him with my foot and saw that he was down. After that, we went back to my house, washed up and went to the University Hospital where I got treatment for my hand.

Q. Crawford, did you, along with Rickey Tucker, get into a fight with Mark Dickson?

A. Yes, we did.

Q. Crawford, were you trying to rob Mark Dickson?

A. No, we were not.

Q. Crawford, during this fight, did you get your hand cut?

A. Yes, I did. It was cut when Rickey hit Mark with a whiskey bottle.

Q. Crawford, was Mark killed in this fight?

A. I think that he was killed when Rickey threw a piece of concrete on his head.

Q. After you and Rickey saw that he was dead, what did you do then?

A. We carried him to a lake on the Griffin Industries Property, weighed him down and sunk him in the lake.

Q. Crawford, can you read and write?

A. Yes, sir.

Q. Crawford, have any of the dectives present today threatened you in any way or promised you anything to get you to give this statement?

A. No, they have not.

Q. Crawford, after you have read this statement and find it to be true and correct just as you have told it to me, will you sign the statement?

A. Yes, I will.

Signed by Crawford Bullock, Jr. Time: 7:30 p.m. Witness: D. F. Fondren. Witness: R. D. Jordan [TR 1034-1037.]

In a second interview, respondent identified a belt buckle found by investigators at the site of the crime as belonging to Rickey Tucker and a flannel shirt as being his. However, he could not explain how a 2 x 4 covered with blood wound up on the top of the Interstate overpass. Finally, respondent admitted that he had known Dickson prior to September 21, 1978, that the only explanation he could give for the incident was that he and Tucker were high on drugs and beer and that Tucker was trying to rob Dickson.

B. The Procedural History

On May 18,1979, respondent was found guilty of the crime of capital murder in the Circuit Court of the First Judicial District of Hinds County, Mississippi, and pursuant to the Mississippi's statutory bifurcated procedure, was sentenced to death by lethal gas. [Miss. Code Ann. § 99-19-101 (Cum. Supp. 1979)]. Upon timely notice respondent exercised his right to appeal both his conviction and sentence to the Mississippi Supreme Court. [Miss. Code Ann. § 99-19-105 (Cum. Supp. 1979)]. On August 6, 1980, the Court sitting en banc unanimously affirmed the aforesaid, and on January 14, 1981, denied rehearing. Bullock v. State, 391 So.2d 601 (Miss. 1980).

Consistently through out both the trial proceedings and on appeal to the Mississippi Supreme Court, counsel for the respondent, challenged the imposition of a sentence of death for crime charged in the indictment, viz., that the respondent was charged as aiding and abetting in the commission of an unintentional homicide and as such could not be sentenced to death. Prior to trial respondent filed, among other things, A Motion to Quash Indictment and Declare Statute Unconstitutional assigning in pertinent part as grounds the following:

2.

> The statute on which the indictment is based, Miss. Code Ann. Section 97-3-19 (2) (e) (Cum. Supp. 1977) is unconstitutional and violative on its face and, particularly as applied in this case, of the Eighth and Fourteenth Amendments to the Constitution of the United State [sic] of America in that:

* * *

(b) The statute inflects the cruel and unusual punishment of death, as applied, for the unintentional killing of a human being with-out deliberate design to effect the death of a human being whereas another criminal statute, Miss. Code Ann. Section 97-3-19 (1)(A); [sic] inflicts a lesser maximum punishment of life imprisonment for the intentional killing of a human being with design to effect the death of the person killed and other criminal statutes, Miss. Code Ann. [sic] Section 97-3-19 (b) and (c) inflict a lesser maximum punishment for virtually the same unintentional killing charged in the instant indictment, all in violation of Equal Protection of the Laws and of the Eighth and Fourteenth Amendments to the United States Constitution, and Section 14 of the Mississippi Constitution (1890), and the death penalty is not a deterrant generally or to the acts charged in the indictment . . . .

[J. A. at 4-6; TR 70-71]

Consistent with this argument, counsel at the close of the guilt phase objected to and was in fact successful in precluding from the jury's consideration a lesser included charge of simple murder thereby limited the issues to a finding of either capital murder or manslaughter. [J.A. at 12-36; TR 1233-45].

On appeal respondent renewed his objections and assigned as grounds that "[t]he Court erred in not sustaining the appellant's motion for a directed verdict made at the close of all the testimony, in not granting the appellant's peremptory instruction, and in not granting the appellant's motion to reduce the charge to manslaughter made at the close of all testimony and also, in not granting the same motions made at the close of the State's case in chief." J.A. at 113-115; Brief of Appellant at 33.

In responding to the rather cryptic argument in support of the proposition, the Mississippi Supreme Court in pertinent part held:

IV.

> Did the trial court err in refusing to grant appellant's requested premptory instruction and in refusing to reduce the charge to manslaughter?
>
> In passing upon a requsted premptory instruction, or motion for directed verdict, in a criminal case, all evidence most favorable to the State, together with reasonable inferences, are considered as true and evidence favorable to the appellant is disregarded. If such evidence will support a guilty verdict, the request for premptory instruction must be denied, as well as the motion for directed verdict. Warn v. State, 349 So. 2d 1055 (Miss. 1977); Toliver v. State, 337 So. 2d 1274 (Miss. 1976).

> In the case sub judice, appellant argues that there was no evidence of intent to rob Dickson and that appellant was an unwilling participant in the robbery-homicide. The evidence is overwhelming that appellant was present, aiding and assisting in the assault upon, and slaying of, Dickson and in removing and discarding his wallet and personal effects therin, and in the taking of the T-bird automobile, which was in the lawful possession and use of Dickson.
>
> The trial court did not err in refusing to grant the preemptory instruction of not guilty. Likewise, the court committed no error in declining to reduce the charge from capital murder to manslaughter. Even so, the question of manslaughter was submitted to the jury upon a proper instruction.
>
> Bullock v. State, supra, at 606-607; Pet. for Cert. at A80-A82.

Later, the Court in performing its mandatory proportionality review in part found:

We have held in Jackson, and pursuant to the above section, that cases in which a death sentence is imposed will be automatically reviewed as preference cases by this Court; that the record will be reviewed and compared with similar cases to determine whether the punishment of death is too great when the aggravating and mitigrating circumstances are weighed against each other in order to assure that the death penalty will not be wantonly or freakishly imposed; and only will be inflicted in a consistent and even-handed manner under like or similar circumstances.

Since Jackson v. State, 337 So.2d 1242 (Miss. 1976), eleven (11) capital murder cases have been decided by this Court. Seven (7) of those cases have involved felony (robbery) murder. Reddix v. State, 381 So.2d 999 (Miss. 1980); Jones v. State, 381 So.2d 983 (Miss. 1980); Culberson v. State, 379 So.2d 499 (Miss. 1979); Irving v. State, 361 So.2d 1360 (Miss. 1978); Voyles v. State, 362 So.2d 1236 (Miss. 1978); Washington v. State, 361 So.2d 61 (Miss. 1978); Bell v. State, 360 So.2d 1206.

We have carefully reviewed those cases and compared them with the case and sentence sub judice. Appellant contends that the extent of his involvement in the crime was as an acomplice, who did not strike the fatal blow, and that Tucker was the principal, who killed the victim. He argues that Tucker was given life imprisonment by the jury, which tried him; that appellant should not receive a greater or harsher penalty than Tucker; and that appelant's death sentence should be reduced to life imprisonment.

* * *

In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), Sandra Lockett was charged with aggravated murder with aggravating specifications. She and three (3) others conspired to rob a pawnbroker's shop. Lockett remained in the getaway automobile with the engine running, the other three entered the pawn shop and during the robbery, Parker, one of the three, killed the proprietor. Prior to trial, Parker pleaded guilty to the murder charge, and agreed to testify against Lockett and the other two. In return, the prosecutor dismissed the aggravated robbery charge and the specifications to the murder charge which limited the possibility that Parker could receive the death penalty.

Two weeks before Lockett's separate trial, the prosecutor offered to permit her to plead guilty to voluntary manslaughter and aggravated robbery, offenses which carried a maximum penalty of twenty-five (25) years imprisonment. Prior to the trial, he offered to permit her to enter a plea a guilty to aggravated murder without specifications, an

offense carrying a mandatory life penalty. These plea bargaining offers were rejected by Lockett; she was tried and was given the death penalty.

Although the case was reversed on another ground, the question was raised as to whether or not Lockett's conviction as an aider and abetter of the actual killer was invalid on the ground that the interpretation by the Ohio Supreme Court of the complicity provisions of the Ohio statute, under which the defendant was convicted, was so unexpected that it deprived her of her due proce right to fair warning of the crime with which she was charged.

The United States Supreme Court held that her conviction as an aider and abetter of the actual killer was not invalid.

* * *

In the case at bar, there is no record of the aggravating circumstances and mitigating circumstances in the trial of Tucker, and it is not possible to determine what circumstances influenced the jury in its life verdict. The law is well settled in this state that any person who is present, aiding and abetting another in the commission of a crime, is equally guilty with the principal offender. Jones v. State, 307 So.2d 549 (Miss. 1975); Bass v. State, 231 So.2d 495 (Miss. 1970); McBroom v. State, 217 Miss. 338, 64 So.2d 144 (1953).

When we compare the present case to other capital cases, which have been afirmed by this Court on the death penalty, the present robbery-murder is equally as wanton, cruel, senseless, heinous and atricious as those. The evidence is overwhelming that appellant was an active participant in the assault and homicide committed upon Mark Dickson and, in our opinion, is not so disproportionate, wanton or freakish when compared to those crimes so as to require this Court to reduce the sentence to life imprisonment. [emphasis added].

Id., at 612-614; Pet. for Cert. at A108-A117.

Succintly focusing on the Court's citation of Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S. Ct. 2954 (1978), and in particular Justice White's separate opinion therein, respondent sought rehearing contending that:

> The Court erred in not reversing Appellant's sentence of death, which was imposed upon a person who has not taken or attempted to take a life, especially where the sentencing jury was not instructed to consider those factors in mitigation of punishment.
>
> J.A. at 116.[2]

As noted infra, rehearing was denied without opinion.

On March 14, 1981, respondent filed a Petition for Writ of Certiorari with this Court. In particular, his fourth ground

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[2] The entire text of the argument in support of this proposition appears on page 117 through 126 in the Joint Appendix.

urged for grant of the writ contended:

> The Mississippi statutes constitute cruel and unusual punishment in that, as interpreted by the Supreme Court of Mississippi, an accomplice, although not actually killing any person, and with no intent to kill, may receive the death penalty. Thus, the statutes as applied are in conflict with this Court's opinion in Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L.Ed.2d 973 (1978), wherein this Court held that the Eighth and Fourteenth Amendments forbid imposition of a sentence of death where there is no finding that the defendant acted with the "conscious purpose of producing death." 438 U.S. at p. 628. As stated by Justice White:
>
> > . . . the infliction of death upon those who had no intent to bring about the death of the victim [sic] is not only grossly out of proportion to the severity of the crime but also fails to contribute significantly to acceptable, or indeed, any perceptible goals of punishment.
>
> 438 U.S. at p. 626.
> J.A. at 128.

Relief was denied on June 8, 1981. Bullock v. Mississippi, 452 U.S. 931, 101 S. Ct. 3068, 69 L.Ed.2d 432 (1981).

On July 28, 1981, respondent simultaneiously filed an Application for Leave to File a Petition for Writ of Error Coram Nobis with the Mississippi Supreme Court [Miss. Code Ann. § 99-35-145 (repealed April 17, 1984, Ch. 378, Miss. Laws of 1984)] and a Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of Mississippi containing identical grounds for relief. On January 29, 1981, the Honorable William Harold Cox, Senior United States District Judge, stayed the execution of sentence pending

further disposition. Among the grounds raised in the identical petitions, responded contended:

> His sentence of death is excessive and disproportionate in violation of the Eighth and Fourteenth Amendments because the jury was not required to find that petitioner intended to kill.

On October 7, 1981, Presiding Justice Roy Noble Lee speaking for an unanimous court denied respondent's State application without opinion.

Upon denial of relief in the State Courts, the parties' attention was once again focused on the Federal proceedings. On August 16, 1982, the Honorable Walter L. Nixon, Jr., Chief Judge, entered an order referring this matter to the Honorable John R. Countiss, III, United States Magistrate, pursuant to an agreement of the parties under 28 U.S.C. § 656 (c) to conduct any and

all further proceedings in the case and order entry of judgment. On October 13 and 14, 1982, the Court conducted an evidentiary hearing and on June 30, 1983, filed an order denying relief.

In its memorandum opinion the District Court initially noted that Instruction 15 (J.A. at 87) given during the guilt phase mandated that before the jury could convict the respondent they must first find that he "consented to the killing" and did an "act which was immediately connected with or leading to [the murder's] commission." Pet. for Cert. at A28-A29. The Court held:

> The presumption, therefore arises that the jury found that Petitioner participated in the actual killing, that he did an act in furtherance of the actual killing, and that he consented to the killing. Jordan v. Watkins, 691 F.2d 1067 (5th Cir. 1982).

In reviewing Bullock's conviction, the Mississippi Supreme Court found the evidence overwhelming that Bullock was not an unwilling participant in the robbery-homicide, as he claimed, but "was present, aiding and assisting in the assault upon, and slaying of Dickson . . . " 391 So. 2d at 606. Petitioner's allegations that he was an unwilling accomplice and did not participate in the killing were also considered and decided adversely by the Court.

Under Enmund, all that must be shown is that a defendant killed during the course of the commission of a felony. Without question the jury and the Mississippi Supreme Court found that Petitioner was present aiding and abetting in the commission of the homicide and that he committed an act in its consumation; however, the Mississippi Supreme Court further held that Petitioner consented to the killing. Petitioner's conviction was some three years, and the Supreme Court's opinion some two years prior to the decision in Enmund and is,

> therefore, not couched in its terms. Nevertheless, the reasonable interpretation of both the verdict and the opinion is that the consenting to, and actually committing an act in furtherance of, the homicide, Petitioner by legal definition actually killed. Moreover, by finding that the Petitioner consented to the homicide, the jury by definition found that he contemplated that lethal force would be employed. The Enmund criteria, therefore, were met.
>
> Pet. for Cert. at A29-A31.

On July 22, 1983, the Court entered a final judgment and denied respondent a certificate of probable cause under 28 U.S.C. § 2253. On July 25, 1983, respondent, represented by new counsel, moved for rehearing, and on August 5, 1983, a stay was entered pending briefing and argument. On September 1, 1983, arugments were heard. Upon due consideration the

motion was granted in part and denied in part with the Court reversing its position on the certificate of probable cause and the stay of execution pending appeal to the Fifth Circuit.

The Court of Appeals relying on its decision in Reddix v. Thigpen, 728 F.2d 705, reh. den., 732 F.2d 494 (5th Cir.), cert. den., _____U.S._____, 105 S. Ct. 397, 83 L.Ed.2d 331 (1984), reversed holding that in the absence of a talismatic finding by the jury that the defendant either killed, attempted to kill, intended to kill or contemplated that lethal force would be used the sentence of death was in violation of the Eighth and Fourteenth Amendments.

VI. SUMMARY OF THE ARGUMENT

The instant petition presents two questions. The first concerns the correct interpretation of this Court's decision in Enmund v. Florida, 458 U.S. 782, 73 L.Ed.2d 140, 102 S. Ct. 3368 (1982).

The second, a somewhat related question, inquires as to whether the Court of Appeals failed to accord certain factual findings made by the Mississippi Supreme Court the required presumption of correctness as mandated by 28 U.S.C. § 2254(d).

The thesis of petitioner's argument in the context of the first proposition focuses upon this Court's decisions in Solem v. Helm, ____U.S.____, 77 L.Ed.2d 637, 103

S. Ct. 3001 (1983), and Pulley v. Harris, ____U.S.____, 79 L.Ed.2d 29, 104 S. Ct. 871 (1984), and the Eleventh Circuit decision in Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985). Succintly stated, petitioners contend that contrary to the ruling of the Fifth Circuit herein Enmund did not engraph the requirement that the jury during the sentencing phase of a capital proceeding return a special verdict relating to the defendant's individual culpability into the body of Eighth Amendment law. Instead, Enmund is a question of proportionality review to be performed by State appellate courts.

The thesis of the second issue focuses on the finding by the Mississippi Supreme Court that respondent was present and was an active and willing participant

in the killing of the victim and the failure of the Court of Appeals to accord such a finding the presumption of correctness mandated by 28 U.S.C. § 2254(d).

VII. ISSUES, ARGUMENTS & AUTHORITIES

1. Enmund: Is it a Question of Proportionality or a Question of Fact for the Jury?

In Enmund v. Florida, 458 U.S. 782, 801, 73 L.Ed.2d 140, 1154, 102 S. Ct. 3368 (1982), this Court vacated the death sentence holding:

> Because the Florida Supreme Court affirmed the death penalty in this case in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken, we reverse the judgment upholding the death penalty and remand for further proceedings not inconsistent with this opinion.

Herein lies the conundrum. Essentially, two opposing schools of thought have developed concerning the enterpretation of the ruling in Enmund. On the one hand, one school, represented by the Fifth Circuit, has concluded that before death may

be constitutionally imposed there must first be a talismatic finding by the jury that the defendant either killed, attempted to kill, intended to kill or contemplated that lethal force would be utilized. See: Bell v. Watkins, 692 F.2d 999 (5th Cir. 1982); Clark v. Louisiana State Penitentiary, 694 F.2d 75 (5th Cir. 1982); Skillern v. Estelle, 720 F.2d 839 (5th Cir. 1983); Reddix v. Thigpen, 728 F.2d 705 (5th Cir. 1984). In Jones v. Thigpen, 741 F.2d 805 (5th Cir.), petition for cert. filed, 53 U.S.L.W. 3720 (U.S. Jan. 30, 1985) (No. 84- 1237), the Court summarized its position thusly:

> Enmund requires that before a state may impose the uniquely severe and irrebocable sentence of death it must "focus on the personal intent and culpability of the defendant

> himself, and not merely that of an accomplice." Reddix, 728 F.2d at 708. To that end, the Court established an Eighth Amendment principle that exists at two levels: first, an accused may not constitutionally receive the death penalty except upon a finding that he himself killed, attempted to kill, or intended to kill; and second, he may not be sentenced to death unless that finding is supported by sufficient evidence in the record. See Skillern, 720 F.2d at 843-49.
>
> Id., at 812

The opposing school, represented by the Eleventh Circuit, specifically rejects the position taken by the Fifth and views the matter as a question proportionality review. For example in Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985), the Court en banc held:

> In our opinion, the question of whether the defendant's culpability satisfies the eighth amendment is sufficiently

distinct from the question of the defendant's guilt that a specific jury finding is not constitutionally required. The necessity of ensuring that the jury finds every element of the crime beyond a reasonable doubt focuses on procedural due process concerns, see United States v. U.S. Gypsum Co., 438 U.S. 422, 98 S. Ct. 2864, 57 L.Ed.2d 854 (1978), whereas the proportionality review mandated by Enmund is aimed at ensuring that imposition of the death penalty is not excessive in light of the defendant's culpability. 102 S. Ct. at 3377. We see no reason why the Enmund inquiry need be characterized as an additional element that the state must prove to the jury beyond a reasonable doubt at the guilt or sentencing phase before the death penalty lawfully can be imposed, so long as a reviewing court can determine from the record that the eighth amendment has been satisfied. It may very well be that a specific jury finding on the defendant's intent or an "Enmund instruction" at the sentencing hearing is desirable, to develop a record that will assist a reviewing court in conducting a proper

> proportionality review in a particular case. We decline to transform the desirability of such procedures, however, into a constitutional requirement that the trier of fact make specific Enmumd findings, such that every defendant sentenced to death without express jury findings on culpability is entitled to a new sentencing hearing.

Id., at 1488.

Of the two, the latter from both a historical and logical perspective is the better reasonaed interpretation.

A.

Historically speaking, the issue presented in Enmund concerned the disproportionality of a sentence of death where the Florida Supreme Court had determined that the record did "not warrant a finding that Enmund had any intention of participating in or facilitating a murder." 73 L.Ed.2d at 1152.

A review of the opinion of the Florida Supreme Court in Enmund v. State, 399 So. 2d 1362 (Fla. 1981), supplies some insight into the situation. The thesis of Enmund's argument was summarized thusly:

> The appellant contends that there is no evidence that he committed premeditated murder on either of the victims, or that he was present aiding and abetting the robbery when they were shot. He argues that the very most the jury could have concluded from the evidence is that he was in the car seen out by the highway when the robbery and murders were committed. Therefore, he contends, the most serious crime of which he could be convicted with regard to each of the homicides is murder in the second degree, based on the felony murder rule. [emphasis added].
>
> Id., at 1368.

The controversey, therefore, raged over a concern of whether Enmund could be convicted of first degree felony murder or second degree felony murder; viz., the degree of Enmund's personal participation in the commission of the murder. In reaching its ultimate conclusion the Court citing Dixon v. State, 283 So. 2d 1(Fla. 1973), thoroughly discussed the Florida Law of Parties noting in particular that there is a distinction between principles in the first and second degree and accessories before the fact. Likewise, the Court determined that death could be imposed if Enmund was a principle in the first degree to either the homicide or the robbery. In particular the Court noted:

We conclude, therefore, that if the appellant's conduct that the jury could have found from the evidence made him as accessory before the fact to the underlying felony of robbery, then his contention that the highest offense for which he may be convicted is second-degree murder must be accepted. If, on the other hand, the jury could have concluded from the evidence that the appellant was a principal of the first or second degree in the crime of robbery, then his contention is without merit and we must hold that the evidence was sufficient for a verdict of guilty of murder in the first degree. To determine the issue as thus framed, it is necessary, as Dixon suggested, to "refer to the rich heritage of case law on the distinctions between principals in the first or second degree and accessories before the fact." State v. Dixon, 283 So. 2d at 11.

All persons participating in a crime are principals of the first or second degree. The actual perpetrator is a principal of the first degree. A person who does not commit the crime with his own hands but is present,

> aiding and abetting the actual perpetrator, is a priuncipal of the second degree. They are both equally guilty of the crime bing committed. Lake v. State, 100 Fla. 373, 129 So. 827 (1930). "An accessory before the fact is one who, though absent at the time of the commission of an offense, does nevertheless procure, counsel, command, or abet another to commit such offense." Kauz v. State, 98 Fla. 687, 124 So. 177, 178 (1929). See generally Henderson v. State, 70 So. 2d 358 (Fla. 1954); Albritton v. State, 32 Fla. 358, 13 So. 955 (1893).
>
> Id., at 1369.

Although acknowledging that the Legislature had purportedly repealed the three distinctions by the enactment of Section 776.011, Florida Statutes (1973), it found that the distinctions had been incorporated in the 1972 amendments to the murder statutes. Ch. 72-724, 1972 Gen. Law Fla. Consequently, the Court found that the

previous body of the Law of Parties was relevant to their determination. The Court then proceeded to hold:

> In a prosecution for murder in the first degree, if the accused was present aiding and abetting the commission or attempt of one of the violent felonies listed in the first-degree murder statute, he is equally guilty, with the actual perpetrator of the underlying felony, of first-degree murder. E.g. Pope v. State, 84 Fla. 428, 94 So. 865 (1922). Furthermore, the presence of the aider and abettor need not have been actual, but it is sufficient if he was constructively present, provided the aider, pursuant to a previous understanding, is sufficiently near and so situated as to abet or encourage, or to render assistance to, the actual perpetrator in committing the felonious act or in escaping after its commission. Id. 84 Fla. at 446, 94 So. at 871.
>
> Id., at 1370.

Hence, we find the comments of this Court to the effect that

As recounted above, the Florida Supreme Court held that the record supported no more than the inference that Enmund was the person in the car by the side of the road at the time of the killings, waiting to help the robbers escape. This was enough under Florida law to make Enmund a constructive aider and abettor and hence a principal in first-degree murder upon whom the death penalty could be imposed. It was thus irrelevant to Enmund's challenge to the death sentence that he did not himself kill and was not present at the killings; also beside the point was whether he intended that the Kerseys be killed or anticipated that lethal force would or might be used if necessary to effectuate the robbery or a safe escape. We have concluded that imposition of the death penalty in these circumstances is inconsistent with the Eighth and Fourteenth Amendments. [emphasis added]

73 L.Ed.2d at 1145-46.

From this point this Court proceeded to elaborate on the proposition that the Eighth and Fourteenth Amendments are violated when a State seeks to impose death upon a "defendant [who] somehow participated in a robbery in the course of which a murder was committed." 73 L.Ed.2d at 1148. To this extent, the court in reviewing all death sentences imposed as of October 1, 1981,[3] for which sufficient data was available, held:

> That juries have rejected the death penalty in cases such as this one where the defendant did not commit the homicide, was not present when the killing took place and did not participate in a plot or scheme to murder is also shown by petitioner's survey of the Nation's death-row population. As of October 1, 1981, there were 796 inmates under sentences

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[3] The opinion by the Mississippi Supreme Court affirming the conviction and sentence herein were published on August 6, 1980.

> of death for homicide. Of the 739 for whom sufficient data are available, only 41 did not participate in the fatal asault on the victim. Of the 40 among the 41 for whom sufficient information was available, only 16 were not physically present when the fatal assault was committed. These 16 prisoners included only 3, including petitioner, who were sentenced to die absent a finding that they hired or solicited someone else to kil the victim or participated in a scheme designed to kill the victim. The figures for Florida are similar. [empahsis added]

Who then is required to make the appropriate finding?

B.

The key to the solution may be found in Enmund proper. Noting that the Florida Supreme Court's interpretation of the facts was in sharp variance with those found by the trial judge, this Court commented that

The Florida Supreme Court's understanding of the evidence differed sharply from that of the trial court with respect to the degree of Enmund's participation. In its sentencing findings, the trial court concluded that Enmund was a major participant in the robbery because he planned the robbery in advance and himself shot the Kerseys. 399 So. 2d, at 1372. Both of these findings, as we understand it, were rejected by the Florida Supreme Court's holding that the only supportable inference with respect to Enmund's participation was that he drove the getaway car. The dissent, while conceding that this holding negated the finding that Enmund was one of the triggermen, argues that the trial court's finding that Enmund planned the robbery was implicitly affirmed. Post, at 809, 73 L.Ed.2d, at 1159. As we have said, we disagree with that view. In any event, the question is irrelevant to the constitutional issue before us, since the Florida Supreme Court held that driving the escape car was enough to warrant conviction and the death penalty, whether or not

> Enmund intended that life be taken or anticipated that lethal force would be used.
>
> Enmund, 73 L.Ed.2d at 1145 n.2.

Consistently throughout the opinion, the Court referenced its comments toward actions taken by the State Supreme Court. E.g., 73 L.Ed.2d at 1144 ("The Florida Supreme Court afirmed Enmund's conviction and sentence. It found . . . ") ("Although petitioner could be convicted of second degree murder only if he were an accessory before the fact rather than a principal, the Florida Supreme Court reasoned . . . "); 73 L.Ed.2d at 1145 ("As recounted above, the Florida Supreme Court held that the facts supported no more than an inference that Enmund was the person in the car by the side of the road at the time of the killings, waiting to help the robbers

escape"); 73 L.Ed.2d at 1152 ("Enmund himself did not kill; and as construed by the Florida Supreme Court, the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder"); 73 L.Ed.2d at 1154 ("Because the Florida Supreme Court affirmed the death penalty . . . ").

Ignoring this aspect of Enmund and in particular the fact that the trial judge had entered findings to the effect that Enmund had planned the robbery and had actually killed the Kerseys, the Fifth Circuit has consistently imposed the requirement that the jury must return in essence a special verdict relative to the extent of the defendant's involvement in the crime. To this end, we note the Court's comments here:

> Bullock contends that his death sentence is constitutionally infirm under Enmund because the instructions to the jury permitted the death sentence without a specific finding that Bullock either killed, attempted to kill, or intended a killing or the use of lethal force. Such was the argument proffered in Reddix. We were persuaded in Reddix; we are likewise now so persuaded.
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> Bullock v. Lucas, supra, at 247.

The rationale apparently underpinning this ruling rests upon a misperceived concept that Enmund has in essence constitutionally imposed upon the State's an additional duty to prove intent prior to imposition of a sentence of death. In Reddix v. Thigpen, supra, the Court while titularly acknowledged that Enmund did not alter the substantive law of felonious intent in the context of felony murder,

premised its decision on the proposition that Enmund required the State to "focus on the personal intent and culpability of the defendant himself." Id., at 708.

Again in the rather curious case of Clark v. Louisiana State Penitentiary, supra, the Court citing Enmund as well as Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L.Ed.2d 508 (1975), and Sandstom v. Montana, 442 U.S. 510, 99 S. Ct. 2450, 61 L.Ed.2d 39 (1979), vacated a conviction of first degree murder noting that the evidence was sufficient to prove robbery and perhaps murder but found the instructions to be deficient because the jury was not required to find that Clark "intended to kill or to do great harm." Id., at 77.

In Skillern v. Estelle, supra, the Court noted that although Texas law required the jury to find beyond a reasonable doubt

that the defendant's conduct which caused the victim's death was committed deliberately and with the reasonable expectation that the victim's death would result, the trial court should have given an addition instruction to the effect "that the Texas law of a party's criminal responsibility for the act of another did not supply the accused's deliberate intent and reasonable expectation that death would result . . ." Id., at 848.

The end result is that the Fifth Circuit has now elevated the question of intent or culpability into an absolute defense to a sentence of death. Cf., Colo. RW Stat § 16-11-103(5)(d).

C.

Such a conclusion completely disregards the premise upon which Enmund was decided; i.e., that a sentence of death is disproportionate to the crime where the proof fails to demonstrate that the defendant neither killed, attempted to kill, intended to kill or contemplated that lethal force would be used. In Pulley v. Harris, ____U.S._____, 79 L.Ed.2d 29, 104 S. Ct. 871 (1984), the Court had these comments on the subject:

> At the outset, we should more clearly identify the issue before us. Traditionally, "proportionality" has been used with reference to an abstract evaluation of the appropriateness of a sentence for a particular crime. Looking to the gravity of the offense and the severity of the penalty, to sentences imposed for other crimes, and to sentencing practices in other jurisdictions, this Court has occasionally struck

> down punishments as inherently disproportionate, and therefore cruel and unusual, when imposed for a particular crime or category of crime. See, e.g., Solem v Helm, _____ U.S. _____, 77 L.Ed.2d 637, 103 S. Ct. 3001 (1983); Enmund v. Florida, 458 U.S. 782, 73 L.Ed.2d 1140, 102 S. Ct. 3368 (1982); Coker v. Georgia, 433 U.S. 584, 53 L.Ed.2d 982, 97 S. Ct. 2861, (1977). The death penalty is not in all cases a disproportionate penalty in this sense. Gregg v. Georgia, 428 U.S. 153, 187, 49 L.Ed.2d 859, 96 S. Ct. 2909 (1976) (opinion of Justices Stewart, Powell, and Stevens); id., at 226, 49 L.Ed.2d 859, 96 S. Ct. 2909 (White, J., concurring).
>
> 79 L.Ed.2d at 35-36.

Again in Solem v. Helm, _____ U.S. _____, 77 L.Ed.2d 637, 103 S. Ct. 3001 (1983), the Court addressed in particular the principles of proportionality review embodied in Enmund:

Most recently, the Court has applied the principle of proportionality to hold capital punishment excesive in certain circumstances. Enmund v. Florida, 458 U.S. ___, 73 L.Ed.2d 1140, 102 S. Ct. 3368 (1982) (death penalty excessive for felony murder when defendant did not take life, attempt to take life, or intend that a life be taken or that lethal force be used); Coker v. Georgia, 433 U.S. 584, 592, 53 L.Ed.2d 982, 97 S. Ct. 2861 (1977) (plurality opinion) ("sentence of death is grossly disporportionate and excessive punishment for the crime of rape"); id., at 601, 53 L.Ed.2d 982, 97 S. Ct. 2861 (Powell, J., concurring in the judgment in part and dissenting in part) ("ordinarily death is disproportionate punishment for the crime of raping an adult woman"). And the Court has continued to recognize that the Eighth Amendment proscribes grossly disproportionate punishments, even when it has not been necessary to rely on the proscription. See, e.g., Hutto v. Finney, 437 U.S. 678, 685, 57 L.Ed.2d 522, 98 S. Ct. 2565 (1978); Ingraham

v. Wright, 430 U.S. 651, 667, 51 L.Ed.2d 711, 97 S. Ct. 1401 (1977); Gregg v. Georgia, 428 U.S. 153, 171-172, 49 L.Ed.2d 859, 96 S. Ct. 2909 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); cf. Hutto v. Davis, 454 U.S. 370, 374, and n 3 70 L.Ed.2d 556, 102 S. Ct. 703, (1982) (per curiam) (recognizing that some prison sentences may be constitutionally disproportionate); Rummel v. Estelle, 445 U.S. at 274, n. 11, 63 L.Ed.2d 382, 100 S. Ct. 1133 (same)

77 L.Ed.2d at 647-48.

Continuing, the Court noted that the Eighth Amendment mandated that a criminal sentence must be proportionate to the crime. The Court then discussed three objective factors by which sentences are to be "reviewed". First, courts should "look to the gravity of the offense and the harshness of the penalty." 77 L.Ed.2d at 649. Citing Enmund as an example, the Court noted that it had "examined the circum-

stances of the defendant's crime in great detail," 77 L.Ed.2d at 650, and found that the penalty was disproportionate to his individual culpability.

Next, the Court suggested that "it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction." 77 L.Ed.2d at 649. The Court elaborated noting that such a comparison was not to be limited to the same or similar offenses but to all crimes. Here again the Court cited Enmund as an example stating that it had noted all of the other felony murders on death row in Florida were more culpable than Enmund.

Finally, the Court suggested that comparison of sentences imposed for commission of the same crime in other jurisdictions. Again Enmund was cited an an example:

In Enmund the Court conducted an extensive review of capital punishment statutes and determined that "only about a third of American jursdictions would ever permit a defendant [such as Enmund] to be sentenced to die." 458 U.S., at ____, 73 L.Ed.2d 1140, 102 S. Ct. 3368. Even in those jurisdictions, however, the death penalty was almost never imposed under similar circumstances. Id., at ___, n 22, 73 L.Ed.2d 1140, 102 S. Ct. 3368. The Court's review of foreign law also supported its conclusion. Id., at _____, n 22, 73 L.Ed.2d 1140, 102 S. Ct. 3368. The analysis in Coker was essentially the same. 433 U.S., at 593-597, 53 L.Ed.2d 982, 97 S. Ct. 2861. And in Weems the Court relied on the fact that under federal law, a similar crime was punishable by only two year's imprisonment and a fine. 217 U.S., at 380, 54 L. Ed. 793, 30 S. Ct. 544. Cf. Trop v. Dulles, 356 U.S. 86, 102-103, 2 L.Ed.2d 630, 78 S. Ct. 590 (1958) (plurality opinion) [emphasis added]

77 L.Ed.2d at 650.

Thus, Pulley v. Harris, supra, and Solem v. Helm, supra, clearly establish that the individualized treatment envisage by Enmund is not a factual question to be decided by a jury but is instead a question of proportionality to be decided by an appellate court. To be sure, in Solem v. Helm, supra, the Court rather unabashedly stated that it had actually examined the facts to reach the conclusion that the requisite showing of culpability had not been met.

Consequently, the question is whether the record supports a finding that the defendant was sufficiently culpable to warrant the imposition of the death penalty.

The position taken by the Fifth

Circuit throws the entire system out of sync.[4] On the one hand, as part of the three point test enumerated in Solem, an appellate court is required to look to the gravity of the offense and the harshness of the penalty. As indicated this includes an independent review of the facts to determine the level of culpability. Why then should the jury be required to perform a superfulous act? We have found no constitutional support for such and suggest that the mandatory proportionality review as prescribed by Miss. Code Ann. § 99-19-105 (cum. supp. 1984) is adequate to insure the necessary individualized consideration on this point.

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[4] To be sure, the position taken by the Fifth Circuit on the Enmund question appears to contradict the position taken in Martin v. Maggio, 711 F.2d 1273 (5th Cir. 1983), to the effect that it is not necessary to the trial court to give limiting instructions or define the aggravating circumstances where State law requires the State appellate courts to independently review the evidence and determine whether such supports the jury's findings prior to affirming a sentence of death. Cf., Moore v. Fant, 722 F.2d 640 (11th Cir. 1983).

D.

Digressing momentarily, let us examine the capital review procedures established in Mississippi.

Similar in nature to the procedures outlined in Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, 96 S. Ct. 2909 (1976), Mississippi law in addition to the conventional appellate processes provides for mandatory appellate review of all sentences wherein death has been imposed. In Williams v. State, 445 So. 2d 789, 811 (Miss. 1984), the Court elaborated upon the requirements contained in Miss. Code Ann. § 99-19-105 (cum. supp.) thusly:

> . . . section 99-19-105 (3)(a) mandates that we review any death sentence to determine whether it has been

"imposed under the influence of passion, prejudice, or any other arbitrary factor." This is the same test we apply in any criminal case in determining whether we should order a new trial on the grounds that the verdict was against the overwhelming weight of the evidence. See, e.g. Quarles v. State, 199 So. 2d 58, 61 (Miss. 1967); Pearson v. State, 428 So. 2d 1361, 1364 (Miss. 1983). It is rare that we invoke this power to order a new trial.

Section 99-19-105(3)(b) requires us to review any death sentence to determine whether there is evidence in support of the jury's finding of a "statutory aggravating circumstance." This is nothing more than the familiar test we apply when a defendant argues here that the trial judge should have entered a judgment of acquittal notwithstanding the verdict of the jury. See, for example, Gandy v. State, 438 So. 2d 279, 284-285 (Miss. 1983). Our power to interfere with the jury's verdict here is even more restricted than under the new trial test of section 99-19-105(3)(a). See Mister

v. State, 190 So. 2d 869, 871 (Miss. 1966).

Finally, we are required to perform what has come to be known as "proportionality review" to determine:

> [W]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.
>
> [Mississippi Code Annotated §§ 99-19-105(3)(c)]

Our experience in the review of death sentences under this section makes it clear that reversal will be extremely rare. Out of twenty-five death penalty cases decided here since hte proportionality review statute has been in place, only two have resulted in the sentence being vacated on this ground. Coleman v. State, 378 So. 2d 640 (Miss. 1979); and Edwards v. State.

As indicated, the Court has on two occasions vacated sentences which it perceived as disproportionate. Coleman v.

State, 378 So. 2d 640 (Miss. 1979); Edwards v. State, 441 So. 2d 84 (Miss. 1983). Concomitantly, the Mississippi Supreme Court has construed § 99-19-105 as inherantly requiring a heightened standard of review in considering the sentencing phase of a capital proceeding. See: Williams v. State, supra; Jones v. State, 461 So. 2d 686 (Miss. 1984.

Within this context, the Court has on several occasions reversed a sentence for what it perceived to be cummulative error, i.e., an error that which standing alone would not merit reversal, or for a perceived denial of fundamental fairness. See: Mhoon v. State, 464 So. 2d 756 (Miss. 1985) (Defendant denied fair trial where over one half of the venire was either in or related to someine in law enforcement); Wiley v. State, 449 So. 2d 756 (Miss. 1984)

(Prosecutorial comments concerning right of appellate review constitute plain error); Williams v. State, supra (although defendant did not object to alleged errors and standing alone none constitute plain error, considered cummulatively the defendant was denied a fair sentencing hearing). See also: Cannaday v. State, 455 So. 2d 713 (Miss. 1984)

Agreeing sub silentio with the analysis contained herein, the Mississippi Supreme Court has traditionally construed individual culpability to be a question reserved to proportionality review. In particular, we note the citation infra to those portions of the Mississippi Supreme Court's dicussion of Bullock's culpability, vis-a-vis Tucker's and whether Bullock's sentence was disproportionate in light

thereof. Concluding that respondent was "an active participant in the assault and homicide" the Court concluded that the sentence was appropriate under the circumstances.[5]

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5 Most courts which have addressed the question have distinguished Enmund where the proof demonstrated that the defendant was present and an active participant in the homicide. See: James v. State, 453 So. 2d 786 (Fla. 1984); State v. Willie, 436 So. 2d 553 (La. 1933) Smith v. State, 424 So. 2d 725 (Fla. 1982); State v. Aquiar, 418 So. 2d 245 (Fla. 1982); People v. Garcia, 454 N.E.2d 274 (III. 1983); Jones v. Francis, 252 Ga. 60, 312 S.E.2d 300 (1984); State v. Oliver, 309 NC 326, 307 S.E.2d 304 (1983); Williams v. State, 250 Ga. 553, 300 S.E.2d 301 (1983); State v. Yates, 310 S.E.2d 805 (SC 1982); Johnson v. Fant, 249 Ga. 812, 295 S.E.2d 63 (1982); Buthum v. State, 249 Ga. 652, 293 S.E.2d 334 (1982); Copeland v. State, 457 So. 2d 1012 (Fla. 1984); Allen v. State, 321 S.E.2d 710 (Ga. 1984); State v. McKay, 680 S.W.2d 447 (Tenn. 1984); Selvage v. State, 680 S.W.2d 17 (Tex. Crim App. 1984); Kelly v. State, 669 S.D.2d 720 (Tex. Crim. App. 1984); State v. Wilson, 690 P.2d 755 (Ariz. 1984).

Continuing in this tradition, the Mississippi Supreme Court rejected a similar claim to that raised herein in Leatherwood v. State, 435 So. 2d. 645 (Miss. 1983). After reviewing the pertinent facts and discussing the holding in Enmund, the Court in the context of performing its mandatory proportionality review held:

> However, we find that the case sub judice does not fall within the holding of Enmund. Enmund did not participate in the actual robbery nor was he present when the murder was committed - he was waiting in the getaway car. Michael Leatherwood, like Enmund, participated in the planning of the crime. The difference is that Leatherwood was also present and involved i nthe execution of the robbery/ murder of Albert Taylor by throwing a rope over his head and pulling it tight with such force that the victim was jerked into the backseat. Leatherwood held the rope tight and told Tokman to "stab him" even as the victim was being subdued.

Though Leatherwood testtified he never believed the robbery would be carried out and certainly never intended to kill the victim, this Court cannot believe that one who attempts to strangle his victim into submission to the point of unconsciousness and tells his accomplice to "stab him" does not intend to or attempt to kill. The appellant's actions spoke louder than his words. Though Michael Leatherwood was not the "triggerman", he planned, schemed, and ultimatley physically subdued the victim by choking him with a rope, while another stabbed and bludgeoned the victim to death. These are hardly the facts upon which Enmund was decided by the United States Supreme Court and thus we find that the apellant's argument is not persuasive, and we find no merit in this assignment of error.

We have reviewed the record and compared it with all of our decisions subsequent to Jackson v. State, 337 So. 2d 1242 (Miss. 1976) involving the death penalty. Some have been affirmed and some reversed. After such comparison, we conclude that the death penalty here is not excessive

> in the light of the aggravating and mitigating circumstances. We further find tht the infliction of the death penalty on Michael Dale Leatherwood is not disproportionate, wanton or freakish when compared to cases involving similar crimes, the facts surrounding them and the defendants.
>
> Id., at 656.

See also: Williams v. State, supra; Irving v. State, 441 So. 2d 846 (Miss. 1983)

As respondent appropriate noted in his response to our Petition for Writ of Certiorari, Miss. Code Ann. § 99-19-101 (cum. supp. 1984) was out of an abundance of caution amended to require the jury to find one of the Enmund criteria before imposing a sentence of death. Being a recommended procedure, Newell v. State, 308 So. 2d 71 (Miss. 1975), the Mississippi Supreme Court has not felt constrained thereby and has continued to treat the matter as a question

of proportionality. See: Cabello v. State, ___So. 2d ___ (Miss. No. 55,581, May 1, 1985), Johnson v. State, _____ So. 2d __ (Miss. No. 55, 265, 1985) (No findings were made pursuant to the statute; however after reviewing the facts the Court found that Enmund was not applicable.)

E.

When renderd to its essential element, Enmund simply requires that the proof demonstrate a level of individual participation that justifies the application of the death penalty. Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983); Drake v. Francis, 727 F.2d 990 (11th Cir. 1984); Henry v. Wainwright, 721 F.2d 990 (5th Cir. 1983) (Unit B); Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984). To this end we find, the Eleventh Circuit's analysis of this issue in Ross v. Kemp, supra compelling:

We do not read Enmund as barring the death penalty for all non-triggermen, but merely as requiring a level of individual participation that justifies the application of the death penalty. 102 S. Ct. at 3377. The Supreme Court's objection in Enmund that Earl Enmund was to be executed "regardless of whether [he] intended or contemplated that life would be taken," id. at 3379, simply does not extend to appellant, whose actions undeniably reflect the contemplation that life would be taken. Appellant does not deny that he and Turner held the Stanford family hostage while their cohorts went to the Lee home. Likewise, it is undisputed that appellant was armed and in the dining room with Turner when Lieutenant Meredith entered the home. He was thus actively engaged in furthering the course of events that led directly to Meredith's murder, whether or not he actually pulled the trigger.

More fundamentally, it is evident that the two primary purposes of capital punishment - deterrence and retribution - legitimately can be applied to the facts of this case. The Enmund Court observed that the death penalty will not likely deter "if a person does not intend that life be taken or

contemplate that lethal force will be employed by others . . ." Id. at 3377. Here, however, it would be incredible to believe that appellant did not contemplate that lethal force would be used either by himself or his accomplice. Likewise, the "intentions, expectations, and actions," id. at 3378 of an individual engaging in such acts rise to a level of culpability such that the retributive purposes of capital punishment are furthered by appellant's sentence of death.

In sum, even if appellant's actions are viewed in their most favorable light, and even if we completely discount the testimony of those witnesses who stated that appellant had told them he thought he had shot a policeman, appellant's culpability still is of a magnitude wholly different from that of Earl Enmund. In Enmund, the evidence showed at most that the defendant had been seated in a getaway car at the side of the road awaiting the robbers' escape. In contrast, the record here depicts an individual who undoubtedly contemplated that lethal force would be used either by himself or by others as they hold a family hostage, and who actively participated in the activities that culminated in

> Lieutenant Meredith's death. Consequently, we find that the death penalty in this case does not violate the eighth amendment and we affirm the district court's denial of habeas corpus relief on this ground.
>
> Id., at 1489-90

The facts in this case as found by the Mississippi Supreme Court fully warrant a conclusion that respondent was present during and an active and willing participant in the homicide and robbery. Neither the Court of Appeals or the respondent has ever questioned, and frankly could never question, the adequacy of these findings at any point of these proceedings. The proof, therefore, clearly demonstrates that respondent's level of culpability was far greater than that credited to Enmund. Upon comparison to other cases involving a putative non-triggerman, the sentence

imposed is neither excessive or disproportionate. Cf., Johnson v. State, supra; Stringer v. State, 454 So. 2d 468 (Miss. 1984); Leatherwood v. State, supra; Reddix v. State, 381 So. 2d 999 (Miss. 1980); Bell v. State, 360 So. 2d 1206 (Miss. 1978). Accord: Brooks v. State, 599 S.W.2d 312 (Tex. Cr. App. 1979); Brooks v. Estelle, 697 F.2d 586 (5th Cir. 1982); Moore v. State, 240 Ga. 807, 243 S.E.2d 1 (1978); Green v. State, 242 Ga. 261, 249 S.E.2d 1 (1978); Stanley v. State, 240 Ga. 341, 241 S.E.2d 173 (1977); Douthit v. State, 239 Ga. 81, 235 S.E.2d 493 (1977); Smith v. State, 236 Ga. 12, 222 S.E.2d 308 (1976).

We therefore, suggest that the decision of the Court of Appeals is in error and that Solem v. Helm, supra, is dispositive.

2. The Court of Appeals Failed to Accord the Findings of the Mississippi Supreme Court the Presumption of Correctness Mandated By 28 U.S.C. § 2254(d).

Substantively speaking, 28 U.S.C. § 2254(d) requires federal courts in habeas corpus proceedings to accord a presumption of correctness to state courts findings of fact or explain why the presumption is not appplicable in view of the facts listed therein. Sumner v. Mata, 455 U.S. 391, 102 S. Ct. 1303, 71 L.Ed.2d 480 (1982). This presumption applied to factual determinations made by both state trial and appellate courts. Sumner v. Mata, 449 U.S. 539, 101 S. Ct. 764, 66 L.Ed.2d 722, (1981). The high measure of deference to which a state court's factual findings are entitled requires that a federal court, considering

an application for habeas corpus, more than simply disagree with the state court before rejecting its factual determinations; instead, it must conclude that the state court's findings lacked even fair support in the record. Marshall v. Lonberger, 459 U.S. 422, 74 L.Ed.2d 646, 103 S. Ct. 843 (1983).

As noted previously, the Mississippi Supreme Court addressed the subject of respondent's culpability in the context of the Fourth Assignment of Eror and in performing its mandatory proportionality review finding on both occasions that Bullock was present during and an active and willing participant in the homicide and the robbery.

In similar fashion, in ruling on respondent's petition for writ of habeas corpus the District Court in pertinent part found:

> In reviewing Bullock's conviction, the Mississippi Supreme Court found the evidence overwhelming that Bullock was not an unwilling participant in the robbery-homicide, as he claimed, but "was present, aiding and assisting in the assault upon, and slaying of Dickson . . ." 391 So. 2d at 606. Petitioner's allegations that he was an unwilling accomplice and did not participate in the killing were also considered and decided adversely by the Court.
>
> Pet. for Cert. at A29.

Numerous references were made to both the State Court and the District Court findings in response to respondent's appeal to the Fifth Circuit with references to § 2254(d) authority constituting one of the principal battlements.

Curiously, the Court in passing on the merits of the appeal completely ignored its ruling in denying the petition for rehearing in Reddix v. Thigpen, 732 F.2d 494

495 (5th Cir. 1984), to the effect that a factual finding by a State appellate court on the Enmund question are presumptively correct until rebutted. Wainwright v. Goode, ____U.S.____, 78 L.Ed.2d 187, 104 S. Ct. 378 (1984); Wainwright v. Witt, 469 U.S. _____, 83 L.Ed.2d 841, 105 S. Ct. (1985).

While the Mississippi Supreme Court's findings in the present matter are not couched in terms of the Enmund criteria, we submit that implicitly there is substantial compliance with the same. LaVallee v. Delle Rose, 410 U.S. 690, 35 L.#d.2d 637,93 S. Ct. 1203 (1973); Townsend v. Sain, 373 U.S. 293, 83 S. Ct.,745, 9 L.Ed.2d 770 (1963). In ruling on the issue, the Court noted that respondent challenged the finding that he intended to rob the victim and argued that he was an unwilling

participant in the robbery and homicide. Clearly, the question of respondent's personal culpability was before the Court. Equally as clear is the undisputed conclusion reached by the Court that:

> The evidence is overwhelming that appellant was present, aiding and assisting in the assault upon, and slaying of, Dickson . . .
>
> Bullock v. State, supra, at 606.

Therefore, considering the ruling in conjunction with the arguments advanced there can be but one conclusion; i.e., that Bullock actually participated in the killing and at lease contemplated that lethal force would be used.

VII. CONCLUSION

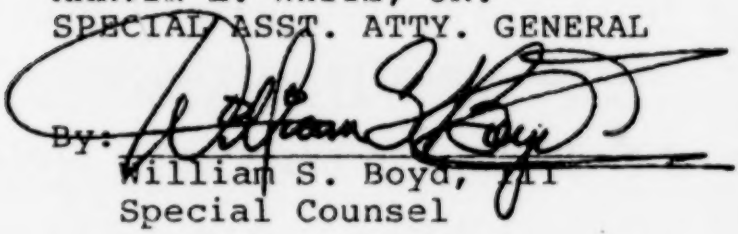
For the foregoing reasons, singularly and collectively, petitioner's respectfully submit that the Court of Appeals erred and that the judgment of the District Court denying respondent's petition for writ of habeas corpus should be reinstated.

Respectfully submitted,

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